SAP HOLDINGS BERHAD (IN LIQUIDATION)

v.

DATO' LER CHENG CHYE & ANOR

High Court Malaya, Shah Alam
Raja Rozela Raja Toran JC
[Post Companies Winding-Up Nos: BA-28PW-77-04-2024; Companies (Winding-Up) Petition No: 28NCC-176-04-2015]
7 January 2026

Company Law: *Liquidators — Remuneration — Respondents as liquidators withdrew monies from applicant's account as remuneration without approval by Committee of Inspection, creditors' resolution or sanction of court — Applicant seeking restitution — Whether withdrawals unlawful and constituted misapplication of applicant's assets — Whether r 142 of Companies (Winding-Up) Rules 1972 might be invoked to bypass s 232(3) of the Companies Act 1965/s 479(2) of the Companies Act 2016 — Whether misfeasance established*

The respondents were appointed as liquidators of the applicant following the winding up of the applicant on 7 August 2015, and remained as liquidators until 31 May 2019 when they were removed and replaced by the Official Receiver. During their tenure, the respondents made a total of 77 withdrawals totalling RM6,257,263.79 from the applicant's account as remuneration without any approval by a Committee of Inspection, and without any creditors' resolution or court sanction. The monies were paid to Ler Lum Advisory Services Sdn Bhd ('LLASSB'), a related company in which both respondents were directors and shareholders. The applicant contended that the withdrawals were made in contravention of s 232(3) of the Companies Act 1965 ('CA 1965')/s 479(2) of the Companies Act 2016 ('CA 2016') and amounted to misfeasance. The applicant accordingly applied vide the instant action for declarations and restitution under ss 236, 274, 277, 305 and 306 of the CA 1965 and/or ss 461, 486, 510, 541 and 542 of the CA 2016. The respondents argued that paras 3 (iv) and (xxi) of the winding-up order authorised the said withdrawals. The issues that arose for determination were whether the respondents were entitled in law to withdraw remuneration from the applicant's assets without approval under s 232(3) of the CA 1965/s 479(2) of the CA 2016, and whether their conduct, viewed cumulatively amounted to misfeasance or breach of duty requiring restitution under s 277 of the CA 1965/ss 541 and 542 of the CA 2016.

Held (allowing the application; ordered accordingly):

(1) The misfeasance jurisdiction under s 277 of the CA 1965/ss 541 and 542 of the CA 2016 was invoked where "it appears to the court" that a liquidator had

misapplied or retained company monies or had been guilty of misfeasance or breach of duty. (para 9)

(2) Paragraphs 3(iv) and (xxi) of the winding-up order described the method or basis upon which remuneration might ultimately be assessed, and were not an exemption from the statutory process. Hence the respondents' argument that the said paragraphs authorised the withdrawals could not be accepted. (para 14)

(3) As was emphasised in *Ong Kwong Yew & Ors v. Ong Ching Chee & Ors And Other Appeals*, while remuneration was contemplated, the quantum and removal of such remuneration could not be unilaterally determined; to do so was a contravention of the Act; and as was reaffirmed in *Emiprima Sdn Bhd v. Wonderful Castle Sdn Bhd (In Liquidation)*, the legislative framework does not conceive of a situation where a liquidator simply 'helps himself' to compensation without stakeholder consent. (paras 15-16)

(4) Rule 142 of the Companies (Winding-Up) Rules 1972 which prescribed the scale of fees for quantifying remuneration, did not confer authority to remove money from the liquidation estate, and could not be invoked to bypass s 232(3) of the CA 1965/s 479(2) of the CA 2016. Quantification and approval were conceptually distinct. The respondents were thus required to obtain approval before withdrawing remuneration and their failure to do so rendered the said withdrawals unlawful. (paras 18-19)

(5) Given that the withdrawals were made without statutory approval and constituted misapplication of company property within the meaning of s 277 of the CA 1965/ss 541 and 542 of the CA 2016; that the payments were made to LLASSB in which both respondents held personal interest; that the time of the withdrawals was conspicuously coincident with proceedings governing the respondents' removal and in certain instances after their removal; that the invoices and time-cost documents relied on to justify the withdrawals were generated or produced only years later; and that no attempt was made by the respondents to obtain sanction from creditors or the court notwithstanding the clear statutory requirement and magnitude of the sums involved, the inference of misfeasance was not speculative but was well grounded, reasonable and compelling. (paras 20-28)

Case(s) referred to:

Emiprima Sdn Bhd v. Wonderful Castle Sdn Bhd (In Liquidation) [2023] 6 MLRA 85 (folld)

Goh Swee Oh & Ors v. Heng Ji Keng & Anor [2010] 3 MLRH 319 (refd)

Ong Kwong Yew & Ors v. Ong Ching Chee & Ors & Other Appeals [2018] MLRAU 491 (folld)

Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Berhad [2012] 6 MLRA 320 (folld)

Legislation referred to:

Companies Act 1965, ss 232(3), 236, 274, 277, 305, 306

Companies Act 2016, ss 461, 486, 479(2), 510, 541, 542

Companies (Winding-Up) Rules 1972, r 142

Counsel:

For the applicant: Joshua Kevin (Ruben, Chow Yee Wan & Ong Yi Ting with him); M/s Lim, Han & Teoh

For the respondents: Wilson Lim (Huam Wan Ying with him); M/s Wilson Lim

JUDGMENT

Raja Rozela Raja Toran JC:

Introduction

(1) This is the Applicant's application in encl 1 seeking declarations and restitution under ss 274, 236, 277, 305 and 306 of the Companies Act 1965 ("CA 1965"), and/or ss 461, 486, 510, 541 and 542 of the Companies Act 2016 ("CA 2016"), against the Respondents, the former joint and several liquidators of SAP Holdings Berhad ("SAP").

[2] The complaint concerns 77 withdrawals totalling RM6,257,263.79 made by the Respondents between December 2015 and June 2019, recorded as "Liquidators' fee including 6% GST" or "Liquidators' fee", and paid to Ler Lum Advisory Services Sdn Bhd ("LLASSB"), a related company in which both Respondents were directors and shareholders.

[3] These payments were made without approval by a Committee of Inspection ("COI"), without any creditors' resolution, and without court sanction. The Applicant contends that this contravened s 232(3) CA 1965/s 479(2) CA 2016 and amounts to misfeasance.

[4] Having considered the evidence and submissions, I am satisfied that the application is well-founded and ought to be allowed.

Background Facts

[5] SAP was wound up on 7 August 2015. The Respondents were appointed liquidators pursuant to the Winding-Up Order. Their appointment continued until 31 May 2019, when they were removed and replaced by the Official Receiver.

[6] During their tenure, the Respondents withdrew RM6,257,263.79 from SAP's account as remuneration. No approval was sought or obtained from stakeholders or the Court.

[7] A significant portion of the withdrawals occurred shortly before hearings concerning their possible removal, and in certain cases after removal. Invoices and time-cost records were only produced years later, in response to this application.

Issues

[8] Two issues arise:

(1) Whether the Respondents were entitled in law to withdraw remuneration from SAP's assets without approval under s 232(3) CA 1965/s 479(2) CA 2016.

(2) Whether their conduct, viewed cumulatively, amounts to misfeasance or breach of duty requiring restitution under s 277 CA 1965/ss 510, 541-542 CA 2016.

Analysis And Findings

Issue (1) The Standard Of Proof — Meaning Of "Appears"

[9] The misfeasance jurisdiction under s 277 CA 1965/ss 541 — 542 CA 2016 is invoked where it "appears to the Court" that a liquidator has misapplied or retained company monies or has been guilty of misfeasance or breach of duty.

[10] The parties referred me to the Court of Appeal's decision in *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Berhad* [2012] 6 MLRA 320, which, although arising under the Capital Markets and Services Act 2007, contains authoritative guidance on the meaning of the term "appears". I accept that they apply with equal force to the misfeasance provisions here.

[11] In that case, the Court of Appeal held that the use of "appears", instead of "proved", denotes a lower standard of proof. The Court is not required to insist upon strict proof, nor to be satisfied beyond doubt. Instead, the statutory threshold is met where there exists a reasonable, well-founded belief based on circumstances which arouse suspicion, grounded in some evidential substratum. A mere possibility is insufficient; equally, absolute certainty is unnecessary.

[12] I therefore approach the evidence with this standard in mind: whether it reasonably appears, on the totality of circumstances, that the Respondents misapplied SAP's monies or acted in breach of duty.

Issue (2) Whether The Respondents Were Authorised To Withdraw Remuneration

[13] Section 232(3) CA 1965 and its equivalent, s 479(2) CA 2016, require that a liquidator's remuneration be approved by the COI, or failing that, by creditors, or failing that, by the Court. This structure is deliberate: Parliament

did not vest the liquidator with unilateral authority to determine or extract his own remuneration.

[14] The Respondents rely on paras 3(iv) and (xxi) of the Winding-Up Order to argue that these clauses authorised the withdrawals. I do not accept that construction. Those clauses describe the method or basis upon which remuneration may ultimately be assessed, not an exemption from the statutory process.

[15] This interpretation accords with the Court of Appeal in *Ong Kwong Yew & Ors v. Ong Ching Chee & Ors And Other Appeals* [2018] MLRAU 491, where similar wording was held not to permit a liquidator to 'self-pay'. The Court emphasised that while remuneration is contemplated, the quantum and removal of such remuneration cannot be unilaterally determined; to do so is a contravention of the Act.

[16] The later Court of Appeal decisions in *Emiprima Sdn Bhd v. Wonderful Castle Sdn Bhd (Dalam Likuidasi)* [2023] 6 MLRA 85 reaffirm this position. There, the Court observed that the legislative framework does not conceive of a situation where a liquidator simply "helps himself" to compensation without stakeholder consent.

[17] The Respondents' reliance on *Goh Swee Oh & Ors v. Heng Ji Keng & Anor* [2010] 3 MLRH 319, a decision preceding the modern jurisprudence, does not assist them. To the extent of inconsistency, the more recent and higher appellate authorities prevail.

[18] Rule 142 of the Companies (Winding-Up) Rules 1972 prescribes the scale of fees for quantifying remuneration; it does not confer authority to remove money from the liquidation estate. Quantification and approval are conceptually distinct. Rule 142 cannot be invoked to bypass s 232(3)/s 479(2).

[19] The Respondents were therefore required to obtain approval before withdrawing remuneration. They did not. The withdrawals were accordingly unlawful.

Whether Misfeasance Is Established

[20] The question then is whether, applying the *Tengku Dato' Kamal* standard, it appears that the Respondents misapplied SAP's monies or acted in breach of duty.

[21] Several features, viewed cumulatively, satisfy this threshold.

[22] First, the Respondents withdrew RM6,257,263.79 without any statutory approval. This is a plain violation of s 232(3) CA 1965/s 479(2) CA 2016 and, on its face, constitutes misapplication of company property within the meaning of s 277 CA 1965/ss 541-542 CA 2016.

[23] Secondly, the payments were made to LLASSB, a company in which both Respondents held personal interests. This conflict of interest underscores the need for strict compliance with approval requirements and heightens the suspicion when no such approval exists.

[24] Thirdly, the timing of the withdrawals is conspicuously coincident with proceedings concerning the Respondents' removal. Several substantial payments were made shortly before removal hearings, and some shortly after the Respondents had been removed. The Court of Appeal in *Ong Kwong Yew* treated similar timing as indicative of impropriety. The Respondents offer no credible explanation.

[25] Fourthly, the invoices and time-cost documents relied on to justify the withdrawals were generated or produced only years later. As emphasised in *Ong Kwong Yew*, *ex post facto* reconstruction of justification warrants caution, and the absence of contemporaneous documentation strengthens the inference that the withdrawals were not properly grounded.

[26] Fifthly, the Respondents made no attempt at any time to obtain sanction from creditors or the Court, notwithstanding the clear statutory requirement and the magnitude of the sums involved.

[27] When these circumstances are assessed against the Tengku Dato' Kamal standard, the inference of misfeasance is not speculative; it is well-grounded, reasonable, and compelling. It plainly appears that the Respondents assumed for themselves the power to unilaterally remove company monies in breach of statutory duty.

[28] I therefore find that misfeasance within s 277 CA 1965/ss 541-542 CA 2016 is established.

Conclusion And Orders

[29] For these reasons, encl 1 is allowed. I order as follows:

(i) It is declared that the Respondents, Dato' Ler Cheng Chye and Lum Tuck Cheong, misapplied and are liable and accountable for RM6,257,263.79 withdrawn as remuneration, and have been guilty of misfeasance, breach of duty and breach of trust.

(ii) The Respondents shall jointly and severally repay to SAP the sum of RM6,257,263.79, together with interest at 5% per annum from the respective dates of withdrawal until full settlement.

(iii) Costs are awarded to the Applicant on an indemnity basis.

(iv) Liberty to apply.